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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

PHOENIX ANCIENT ART, S.A., ET  
AL.,

Plaintiffs,

v.

17 CV 0241 (ER)

J. PAUL GETTY TRUST, ET AL.,

Defendants.

New York, N.Y.  
September 12, 2018  
2:32 p.m.

Before:

HON. EDGARDO RAMOS,

District Judge

APPEARANCES

SHORE, CHAN, DePUMPO, LLP  
Attorneys for Plaintiffs

BY: MICHAEL W. SHORE  
ANDREW HOWARD

AND

HARRIS BEACH, PLLC  
BY: ELLIOT A. HALLAK

MUNGER, TOLLES & OLSON, LLP  
Attorneys for Defendants

BY: MATTHEW A. MACDONALD  
STEPHANIE G. HERRERA (Present via telephone)

ALSO PRESENT: HICHAM ABOUTAAM, Plaintiff

STEPHEN W. CLARK, VP, General Counsel, Secretary  
The J. Paul Getty Trust

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(In open court)

THE COURT: Good afternoon, everyone. Please be seated.

(Case called)

MR. SHORE: Michael Shore for Phoenix Ancient Art.

MR. HOWARD: Andrew Howard for plaintiffs.

MR. HALLAK: Elliott Hallak, Harris Beach, for plaintiffs as well.

THE COURT: And who is this gentlemen?

MR. SHORE: This is our client, Mr. Aboutaam.

THE COURT: Good afternoon.

MR. ABOUTAAM: Good afternoon.

MR. MACDONALD: Your Honor, Mat Macdonald from Munger Tolles on behalf of Getty, and with me is Stephen Clark, general counsel of Getty.

THE COURT: Good afternoon to you all.

It seems as though discovery is proceeding swimmingly. I have the parties' letters before me; so why don't we take them in turn, starting with plaintiff's letter of June 14. First issue being the stay, lifting the stay on depositions. So Mr. Shore or Mr. Howard?

MR. SHORE: Your Honor, thank you for hearing us today, and I'm pleased to meet you. This is my first time here in your court.

THE COURT: Welcome.

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1 MR. SHORE: Thank you very much. I didn't realize I  
2 was going to get stripped when I came in; so I appreciate the  
3 security.

4 THE COURT: Only Texans.

5 MR. SHORE: I feel very safe.

6 Judge Ramos, this case was filed in January of 2017.  
7 We don't even know what facts are in dispute because we don't  
8 have an answer. They have not denied a single averment in our  
9 complaint; so we don't even know today what they deny and what  
10 they don't deny. We have a lot of attorney arguments they make  
11 in their motions to dismiss, but there's no evidence.

12 So what needs to happen here, I believe and what I  
13 would request the Court is to do, is to hold these, slash,  
14 motions to dismiss in abeyance or even deny it without  
15 prejudice, and send the parties back to actually conduct  
16 discovery. It's potentially a \$70 million lawsuit. I am  
17 probably the only attorney here who have met the Torlonia  
18 family, who had broke bread with them in the villa, who visited  
19 them at their hunting lodge, who visited them at another one of  
20 their villas, who negotiated -- tried to negotiate a separate  
21 deal with them with a Chinese museum and finally gave up.

22 I wasn't a part of the negotiations of the  
23 transactions in this deal, but I know the family. I know how  
24 much they desperately need cash. Their bank failed the capital  
25 stress test of the European Union Banking Authority.

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1 THE COURT: I'm sorry, what was that?

2 MR. SHORE: The European Union Banking Authority.

3 They own a bank. It failed a stress test by several tens of  
4 millions of dollars. They could not come up with the money.  
5 They are desperate for money. When we were negotiating with  
6 them on behalf of the World Art Museum in China and the Chinese  
7 Ministry of Culture to acquire the collection, we couldn't get  
8 it done for various reasons. But they got so desperate, they  
9 dropped the price down to a third of what they were originally  
10 asking if only the Chinese would pay them the money and not  
11 require any approval from the Italian government to do the  
12 deal.

13 So they are desperate for money. They are -- like a  
14 lot of noblemen in Europe or old noble families, they are  
15 property rich and cash poor. And their No. 1 cash -- or their  
16 No. 1 asset they have that is worth anything is this  
17 collection. They are desperate to do a deal.

18 I know exactly what's going on here, and I think  
19 probably your Honor does too. There's an agreement to have an  
20 agreement as soon as this lawsuit is over, and that's what we  
21 need to get into the discovery on. I need to take the  
22 deposition of Mr. Potts. I need to take the deposition of the  
23 people who have actually been in contact with the family.

24 I've heard lots of discussions about, you know, there  
25 was some sort of an agreement that we wouldn't take depositions

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1 in the case, and I'll be the first to tell you, maybe we  
2 weren't quite as smart as we should have been as far as  
3 understanding the lengths to which The Getty would go to avoid  
4 allowing discovery to take place, real discovery, unfettered  
5 discovery, deposition discovery. Because what they did is they  
6 filed a motion to dismiss. We replied. Parts of the motion to  
7 dismiss were denied. And now they file another motion to  
8 dismiss, in violation of the agreement that they had that they  
9 would not move to dismiss the contract claims until -- they  
10 agreed they weren't going to do that.

11 So I think the gamesmanship and -- they've spent more  
12 money trying to avoid giving simple discovery than I could ever  
13 have contemplated they would spend on the entire lawsuit. This  
14 is a simple lawsuit. They admit they circumvented the  
15 non-circumvention agreement. They admit it. They talked to  
16 the family. They went behind the backs of my clients. They  
17 talked to the family. They sent 30 trustees to Italy to meet  
18 and see the collection.

19 I've been in the basement. I've laid my hands on  
20 these statutes. I know what they are. I've been there.  
21 There's a deal to have a deal. That's what's going on here,  
22 and we need to have the depositions. We need to take full  
23 discovery, and then if they want to file a motion for summary  
24 judgement on some kind of ground, more power to them.

25 But right now, what they're trying to do is they're

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1 trying to win the case on a pleading issue, without giving full  
2 discovery, and I think some of the other things that is readily  
3 apparent at this point is they claim they aren't withholding  
4 any documents. Well, they're not withholding any documents  
5 that they agreed to give us. That may be true, but of course,  
6 that's always true. No one ever withholds the documents that  
7 they agree to give us.

8 They're not searching personal computers. They're not  
9 giving us documents from their Italian lawyer, and the way this  
10 works, there can be no deal without the approval of the Italian  
11 Ministry of Culture. It's a deal with the Italian Ministry of  
12 Culture. They've hired a lawyer to go negotiate the terms of  
13 whatever they're going to do, and now they're trying to say  
14 they don't have to give us any discovery from the person that  
15 they're using to set up a deal with the Italian government  
16 based upon a structure, I'm quite sure, that our clients  
17 designed because I helped them design it.

18 THE COURT: As I understand the defendant's position,  
19 they're not giving you discovery with respect to that person  
20 because that person is a lawyer, giving legal advice.

21 MR. SHORE: I'm not sure what their role is, but he's  
22 not a lawyer giving legal advice, but he is interacting with  
23 the third party, the Italian government. Those interactions  
24 with the Italian government are not privileged. Those are  
25 interactions with a third party. As a matter of fact, they're

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1 interactions with a government.

2 And when you use a lawyer to go and do a negotiation  
3 with a foreign government and then the Ministry of Culture to  
4 try to come up with terms that you can get a collection  
5 exported from the country that otherwise would be illegal to  
6 do, that you can't hide behind the lawyer.

7 And they're doing the same thing with Mr. Clark.  
8 Mr. Clark does all kinds of things. I'm happy -- we'll pay for  
9 it. Let's have a discovery master appointed to look at every  
10 single e-mail and every document that Mr. Clark has seen, and  
11 let that discovery master decide whether he's acting as a  
12 lawyer or whether or not he's acting as a business person.

13 But the law in this circuit is clear. It's very  
14 similar to the law in the Fifth Circuit that I'm more familiar  
15 with. The law is very clear. Just because you pass something  
16 by a lawyer, just because you put on a cc, just because you  
17 have him do your bidding for you and a business discussion,  
18 he's not some kind of consigliere here. He is acting as a  
19 businessperson, and that's what they use him for.

20 So I am happy to pay for the special master. I'm  
21 happy to waive attorney-client privilege completely for my  
22 client if they'll do the same for theirs. I'm happy to do  
23 that. I was always taught, by some really fine lawyers,  
24 ethical lawyers, that the whole purpose of justice and advocacy  
25 is everybody agrees to put all the facts on the table, and

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1 zealous advocacy comes in to argue what those facts mean.

2 Zealous advocacy should not be used to hide facts. That's what  
3 we've got here. We've got the most zealous advocacy I've ever  
4 seen in a case that's this old, not to let the facts come out.

5 So I want to take the depositions of the people I need  
6 to take depositions of, the people who are interacting between  
7 The Getty and the Torlonia. If The Getty is helping the  
8 Torlonia arrange for loans or financing to prop up their bank,  
9 I way want to be able to get into that.

10 There's a wide-ranging, multi-tentacle relationship  
11 between The Getty and the Torlonia family. And I guarantee  
12 you, I guarantee you -- and if I'm wrong, you can rain down  
13 upon me your wrath -- this collection would already be at a  
14 different museum, it would be at The Met, it would be at the  
15 British Museum, it would be at the Louvre, it would be at  
16 another museum if they didn't have a deal with The Getty to  
17 have a deal because they need the money.

18 They are desperate for the money, and so there is a  
19 deal. There is a deal to have a deal, or something is going  
20 on, and they're trying to hide it from us. And all we want to  
21 do is turn on the light. Well, turn on the light and there  
22 will be nothing there, or we'll turn on the light and the  
23 cockroaches will scatter.

24 But this idea that they can continuously file serial  
25 12(b)(6) motions, basically supported by nothing more than



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1 attorney argument, to try to keep us from having our day in  
2 court, it's wrong. And, frankly, your time, I believe -- it's  
3 up to you. It's your time, but I think your time is being  
4 abused by this process. Let's just go do discovery.

5 THE COURT: Let me ask you this. What's happened  
6 between the entry of the revised scheduling order and now that  
7 would require the lifting of the stay that you agreed to?

8 MR. SHORE: Well, for one thing, they violated their  
9 agreement. They said they would not -- the motion to dismiss  
10 was denied, or you granted right to replead, and they agreed  
11 that they would not -- that we could not take depositions until  
12 they filed an answer to the contract claims, but they agreed  
13 they would not attack the contract claims in a motion to  
14 dismiss and they have. So they violated their agreement.

15 I mean, they agreed that until all of our factual  
16 allegations were not to be taken as true, that we would then  
17 get depositions. Well, what they've done is they have simply  
18 filed another motion to dismiss on contract claims, which they  
19 said they would not do, and this is a stall tactic. This is  
20 gamesmanship. This is anything and everything but the truth.

21 Let's turn the light on. They have cross-examination,  
22 and I believe that one of our Supreme Court justices said, is  
23 the No. 1 way to get to the truth. It is the great truth  
24 teller. And they are desperate to avoid cross-examination.

25 I also know, by the way, Mr. Potts. Mr. Potts used to

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1 be the head of a museum down in my neck of the woods. I know  
2 members of the board of trustees there. I know what kind of  
3 person Mr. Potts is. I know the reasons why he left.  
4 Mr. Potts is not a nice person. The Getty is not a nice  
5 museum. The Torlonia family is not a nice family, and they  
6 don't have any respect for this Court. They don't have any  
7 respect for law, and they will do anything and everything they  
8 can, just like they did in Italy. They filed with the courts  
9 in Italy. They've been sued by the Italian government more  
10 than a dozen times. This is a group of people who will do  
11 anything and everything to avoid the lights being turned on.

12 THE COURT: Who has been sued by the Italian  
13 government, the Torlonia family or The Getty --

14 MR. SHORE: The Torlonia family. When it comes to  
15 back dealing, they've been sued over tax issues. They've been  
16 sued over building permit issues. They've been sued over a  
17 multitude of things. They've even been sued, according to what  
18 they told me, they've even been sued for illegal hunting on  
19 their own property out in the country. This is not a nice  
20 group of people, and they're not going to ever allow us to see  
21 anything until the U.S. -- an Article III U.S. district judge  
22 tells them they have to, and even then.

23 I am more than happy to pay for, myself, a discovery  
24 master to go and to search The Getty and to search the personal  
25 computers, all the e-mail accounts and everything else because

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1 I don't trust Getty to tell their lawyers the truth, and I  
2 don't trust their lawyers to press The Getty to do it. This is  
3 not -- this is a -- and I know these are serious accusations.  
4 I stand behind them, and I guarantee you if we get into the  
5 meat of this, you're going to see some things that will turn  
6 your hair white.

7 THE COURT: I mean, they are serious accusations and,  
8 Mr. Shore, they're also based on an assumption that there's a  
9 deal to do a deal, and I don't have any actual evidence before  
10 me that that's the case. And they're also based on your view  
11 of the character of certain of the individuals that are  
12 involved.

13 MR. SHORE: The only way that I can give you evidence  
14 is if you let me go get it. And so when you're saying you  
15 don't have any evidence before you, of course you don't because  
16 they won't let us get it. They won't let us take a deposition.  
17 They told you before, in another hearing, that they ran the  
18 search terms we'd asked them to run and got 25,000 hits. They  
19 produced 300 documents. So where's the other 24,700 documents?

20 I have nothing -- the only thing I have from Mr. Potts  
21 are calendar entries and other things -- or Clark. They sent  
22 30 members of their board of trustees to Italy, 30 people to  
23 Italy to view the collection and meet with the Torlonia family.  
24 Do you think they did that if they didn't have a deal? Do you  
25 think they would send 30 people over there? Do you think that

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1 the Torlonia family would not have that collection under  
2 contract with the British Museum or the Louvre or The Met or  
3 one of the other major museums of the world if they didn't  
4 already have a deal in their back pocket from The Getty?

5 THE COURT: I, frankly, don't know the answer to that  
6 because I don't know this industry.

7 MR. SHORE: Right. Well, I can tell you that if you  
8 let me take -- if you open up discovery and let me take  
9 depositions of everybody at The Getty that I want to take  
10 depositions of, and I can't make a case, okay. But give me my  
11 chance. Give me my chance to get past this stone wall,  
12 obfuscation, obstruction and get to the heart of the matter.

13 I know this family. I know the Torlonia family. I  
14 know what they need. I know what they want. I even know what  
15 their price was, and there's no way that there's not a deal.  
16 And if you dismiss this case, or you don't give us our day in  
17 court, within weeks there will be a press release announcing  
18 The Getty Museum is going to -- or in cooperation with some  
19 other museum but The Getty museum is going to have a big show.

20 My client worked three years, thousands of hours,  
21 millions of dollars' worth of time, trouble and effort, and  
22 they admit they circumvented him. They admit they went behind  
23 his back, and we know now, with what little discovery we got,  
24 not only did they go behind his back, they lied to him about  
25 it. They denied doing it.

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1 THE COURT: They lied to whom? I'm sorry.

2 MR. SHORE: They lied to Mr. Aboutaam. They went  
3 behind his back and then to his face Mr. Potts looked him in  
4 the eye and lied to him about what was going on and whether or  
5 not they still had an interest. That's in the record. That's  
6 not even denied by The Getty.

7 THE COURT: Let me hear from Mr. MacDonald on this  
8 group of issues.

9 MR. MACDONALD: Good morning, your Honor -- or  
10 afternoon, I'm sorry. I'm a little confused about what time  
11 zone I'm in.

12 Let me start by making a couple of sort of general  
13 points, and then I think I may have a slightly different  
14 proposal than the one Mr. Shore has in mind.

15 I think the first is sort of a foundational point,  
16 which is I think Mr. Shore has the order of events in a lawsuit  
17 in Federal Court backwards. Which is, the way this works is  
18 you file a valid pleading, and then you get to go take  
19 discovery. You don't get to take discovery to file a valid  
20 pleading, and so we think the question that's before the Court  
21 is whether there's a valid pleading. We think there's not. We  
22 filed our reply last night. That motion is fully briefed. We  
23 think that motion can be decided and dispose of the entire  
24 case.

25 But let me now clear the air about a couple of things

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1 that Mr. Shore said. I think the idea that we are withholding  
2 documents is absurd, and I don't think that there's any  
3 evidence in the record to support that accusation. We employed  
4 a robust search protocol that I think was quite reasonable,  
5 that plaintiffs had considerable input in, and that your Honor  
6 blessed at a hearing in January of 2018.

7 When we reviewed those documents, we applied -- our  
8 search criteria was, it was responsive if it said anything at  
9 all about Torlonia, period, full stop. We searched more than  
10 20 custodians. We applied 36 search terms, at least. It  
11 depends on how you count. We reviewed 17,000 documents. We  
12 produced 2,600 documents.

13 Mr. Shore alluded to the fact that the second set of  
14 searches we ran had a very low response rate. The reason we  
15 produced some smaller number of documents than the hits that we  
16 described there were for the Court, are, No. 1, that the Court  
17 narrowed the search that we were required to run; and No. 2,  
18 the overwhelming majority of the documents that we reviewed in  
19 that second search had nothing to do with this case.

20 They were about -- one of the search terms we applied  
21 was the word "Phoenix." And when I reviewed documents in the  
22 Phoenix population, I saw a lot of e-mails with the word  
23 Phoenix, Arizona, in the footnote.

24 The answer is on this document discovery that there is  
25 simply nothing left to find. I'm not saying we'll never find

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1 another document in this case ever, but the significant  
2 documents have been found.

3 As to deposition discovery, we have repeatedly offered  
4 to make witnesses available on the limited subject of whether  
5 there is any deal. We have done so in the hope that this case  
6 could be over, and we have said very, very frequently, that we  
7 are allowed to have people deposed on that. We don't think --

8 THE COURT: Including Mr. Clark?

9 MR. MACDONALD: Mr. Clark? I would allow Mr. Clark to  
10 be deposed on that limited question. Yes, sir. I don't think  
11 we've ever discussed exactly who because that proposal has  
12 never gone anywhere because plaintiffs have said they want to  
13 be able to ask about everything that ever had anything to do  
14 with the case.

15 I think a targeted deposition is a much more sensible,  
16 efficient way to get this resolved. But we could have  
17 Mr. Clark testify under oath that there's no deal, that there's  
18 no deal to have a deal. There's no documentary evidence in  
19 this record to suggest that there's a deal to have a deal.

20 As for Mr. Calabi we have resisted running full  
21 document searches on his documents because he's an Italian  
22 lawyer who was retained to advise The Getty. I have no idea,  
23 your Honor, what the basis for the assertion that we retained  
24 him to negotiate with the Italian government is. I have no  
25 idea what the basis is for the assertion that he is negotiating

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1 with the Italian government. I have never heard that  
2 allegation until we heard in a meet and confer or in a letter  
3 we received from the plaintiffs.

4 THE COURT: Well, are you in a position to make a  
5 representation that Mr. Calabi didn't negotiate with the  
6 Italian government?

7 MR. MACDONALD: Yes. I think I am. I've asked him  
8 whether he has negotiated with the Italian government, and I  
9 understand from my client that he has not negotiated with the  
10 Italian government.

11 THE COURT: Okay.

12 MR. MACDONALD: There's no deal being negotiated.

13 I think we have a very different view about what the  
14 solution is. There's a lot of discovery matters on your  
15 Honor's plate this morning, a lot of disputes. Our view is  
16 that the appropriate thing to do is to hold all of these issues  
17 in abeyance and resolve them after the motion to dismiss has  
18 been decided. That's the procedure that's laid out in Iqbal.  
19 The doors of discovery don't get unlocked until the plaintiff  
20 files a valid claim.

21 We think we filed a very strong motion. We filed our  
22 reply brief last night. There is obvious judicial efficiency  
23 rationales for that, and we don't have to resolve this. The  
24 parties can stop spending money on this case while that motion  
25 is pending.



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1           Lastly, I think as to Mr. Shore's guarantee, I wonder  
2 if Mr. Shore would guarantee --

3           THE COURT: What's the guarantee? I'm sorry.

4           MR. MACDONALD: I'm sorry?

5           THE COURT: Which guarantee?

6           MR. MACDONALD: I heard Mr. Shore make a guarantee  
7 that there would be evidence that would turn your Honor's hair  
8 white if depositions were open. I wonder if Mr. Shore would  
9 back that guarantee if I were to offer our witnesses for a  
10 limited deposition on the question of whether there is a deal  
11 to have a deal or whether there's a deal, or what The Getty's  
12 dealings with the Torlonia family is. If he's wrong, whether  
13 he would agree to pay our attorney's fees because I think that  
14 guarantee will not -- he will not be able to back that  
15 guarantee, your Honor.

16           THE COURT: He offered to pay for a lot of things. I  
17 don't recall that he offered to pay your attorney fees.

18           MR. MACDONALD: No, I was asking if he would offer to  
19 pay our attorneys fees.

20           MR. SHORE: May I give a brief response?

21           THE COURT: Yes or no?

22           MR. SHORE: I'll condition it, yes.

23           THE COURT: Okay.

24           MR. SHORE: Here's my brief response. They have not  
25 told us whether they searched their collection management

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1 database. That's a database that has all the correspondence  
2 related to the acquisition, and so we don't know that.

3 THE COURT: Collection management database?

4 MR. SHORE: There's something called the collection  
5 management database. It's disclosed in their 2016 acquisition  
6 policy. So I don't know that they've searched the collection  
7 management database. I want to be able to ask in a deposition.  
8 I want to be able to ask in a deposition each witness what  
9 private e-mail accounts do you have? Have you communicated  
10 with the Torlonia family through a private e-mail account?  
11 Have all of those private e-mail accounts been searched by the  
12 attorneys? Have they been turned over?

13 I want to be able to ask about which account's the  
14 attorney-client privilege. They have objected and refused to  
15 produce hundreds of documents that involve Mr. Clark, and  
16 there's no basis for that privilege. There's no basis for the  
17 assertion of the privilege. I want to be able to challenge it.

18 And here's the thing, your Honor, I know you were an  
19 experienced lawyer before you took the bench. If there's no  
20 deal and there's no deal for a deal, why do they want a limited  
21 deposition? Why don't they not want me asking about where do  
22 you store documents? What was searched for? Whose accounts  
23 were searched?

24 All that stuff, they will say, oh, that has nothing to  
25 do with the deal, whether deals exist. I want to be able to

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1 probe what they looked for, where they looked for it. I want  
2 to probe whether there are any deals with the Torlonia bank,  
3 whether they've helped the Torlonia bank gain capital to meet  
4 their undercapitalization requirements. There's a lot of ways  
5 that a sneaky, underhanded person can do this and could have a  
6 deal to set up a deal.

7 And I'm a smart guy. They're very smart people, and  
8 if they -- the only reason why they want to a limited  
9 deposition, which there's nothing in the Federal Rules of Civil  
10 Procedure that allows this. In the Federal Rules of Civil  
11 Procedure, I take a deposition, they can object to form and  
12 they can object to privilege. They can't object to the scope  
13 of the deposition, and for somebody who is getting up the  
14 self-righteous anger and saying there is no deal, there is no  
15 deal to have a deal, you know, you haven't done anything, why  
16 not allow a real deposition?

17 Why not allow me to figure out what they've looked  
18 for, where they've looked, what other people may have contacted  
19 the Torlonia, what other business deals around the Torlonia  
20 family could be going on. That's what they're afraid of,  
21 because the Torlonia family is smart. These people are smart.  
22 They know how to game the system. They know how to game the  
23 system of antiquities importation and exportation. They know  
24 how to game the system period.

25 What he said was that this lawyer, this Italian

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1 lawyer, hasn't negotiated with the Italian government. Has he  
2 communicated with the Italian government? Has he passed on  
3 communications for them to the Italian government? Anything  
4 this lawyer has communicated to the Italian government, I  
5 should get. If he communicated to the Italian government on  
6 behalf or if he communicated with a member of the Ministry of  
7 Culture on that, or if he communicated with the Torlonia family  
8 on their behalf.

9 So they're playing games here. They're playing words  
10 games. They're playing semantic games here. So the way to get  
11 to the heart of this is let me depose these guys, and all of  
12 this is going to be stripped away. Ultimately, I don't think  
13 their lawyer is going to let them perjure themselves, and I  
14 don't think Mr. Clark is going to perjure himself. I think  
15 he's going to be forced to tell the truth, but they admitted  
16 they circumvented my client. They admitted they violated the  
17 agreement, and the idea --

18 THE COURT: Can I just ask, Mr. Macdonald -- I've  
19 given you your opportunity, Mr. Shore -- have you admitted that  
20 you circumvented the non-circumvention agreement?

21 MR. MACDONALD: No. We have admitted -- we have  
22 truthfully said, which we have never attempted to deny that The  
23 Getty talked to the Torlonia family about a non-profit  
24 exhibition. We deny that they ever discussed an acquisition,  
25 and we do not agree that talking about a non-profit exhibition

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1 is a breach of a non-circumvention agreement.

2 MR. SHORE: But see, there we go. There's the  
3 gamesmanship. They're trying to say that the transaction has  
4 to be a sale. The agreement says they can't talk with the  
5 Torlonia family about any transaction. An exhibition is a  
6 transaction. A non-profit -- The Getty is a non-profit.  
7 Great. That doesn't mean it's not profitable to the Torlonia  
8 family. It just means it's not profitable to The Getty.

9 This is exactly the kind of stuff, this gamesmanship,  
10 this wordsmithing, this little sneaky underhanded way that they  
11 represent things. They talked to the Torlonia family. They  
12 negotiated with them. They sent 30 trustees to Italy to meet  
13 with them. They hired a lawyer in Italy to help do this  
14 transaction. All of this is in violation of the  
15 non-circumvention agreement, unless you take their  
16 interpretation of the agreement at the threshold level and say  
17 a transaction is only a sale. That's preposterous. They are  
18 self-granting themselves summary judgement is what they're  
19 trying to do.

20 THE COURT: Mr. Macdonald, Mr. Shore has indicated on  
21 a number of occasions that you violated some sort of agreement  
22 to not move to dismiss.

23 MR. MACDONALD: Yes.

24 THE COURT: What's that?

25 MR. MACDONALD: I think we, in the negotiation of the

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1 stay, there was no discussion of what the contents of our  
2 motion would be -- of our motion to dismiss would be. They  
3 asked -- they called me up. They asked me for an extension of  
4 the discovery schedule. The discovery schedule had --  
5 previously negotiated discovery schedule was getting short.  
6 They wanted to extend it by some lengthy period of time.

7 I was concerned that discovery would expand to fill  
8 the available time, and so the only condition I asked for, in  
9 agreeing to give them more time to take discovery, was that  
10 there be a stay of depositions while my motion to dismiss was  
11 pending. I told them I was going to file a motion to dismiss.  
12 We never once discussed what that motion would entail, and we  
13 agreed that it made a lot more sense for the case, the  
14 discovery to proceed after we actually answered so we know  
15 what's in dispute.

16 I believe what they are referring to is a line in my  
17 initial motion to dismiss, which simply said that we were not,  
18 at that time, moving to dismiss that particular pleading on  
19 contract grounds. We never have made any representation about  
20 what we would do in response to an amended pleading, and I have  
21 never been asked what I would do in response to an amended  
22 pleading.

23 THE COURT: So let me ask, when was this amended  
24 scheduling order entered into on those conditions?

25 MR. MACDONALD: Approximately May, your Honor.

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1 THE COURT: Of what year?

2 MR. MACDONALD: Of this year.

3 THE COURT: Of this year?

4 MR. MACDONALD: Yes.

5 THE COURT: So that was how many months ago?

6 MR. MACDONALD: Four months ago.

7 THE COURT: So let me ask you the same question that I  
8 asked Mr. Shore. What has happened between then and now that  
9 would require the stay of depositions to be lifted?

10 MR. MACDONALD: Our position would be that nothing  
11 requires it to be lifted, and in fact, it's our view that the  
12 stay should be extended to all discovery.

13 THE COURT: Go ahead.

14 MR. SHORE: Your Honor, in our letter of June 14th, we  
15 actually cite -- what he said was, they would not challenge our  
16 contract claims at all until the appropriate time, quote, "When  
17 the Court is not required to accept plaintiff's allegations as  
18 true." In a 12(b)(6) motion, you're required to accept our  
19 allegations as true.

20 So they said they were not going to attack our  
21 contract claim until after motions to dismiss had been decided.  
22 Then they reneged on that, and they filed a motion to dismiss  
23 the contract claim. That's in the first full paragraph of our  
24 June 10 letter. This is gamesmanship of the worst kind. Let's  
25 turn on the light. Let's see what's there.

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1 THE COURT: The June 14th letter, you said?

2 MR. SHORE: The June 14th, 2018, letter, and the quote  
3 is from docket 37 at one and also docket 58, where the  
4 representation that they would not change the plaintiff's  
5 contract claims until "the appropriate time when the Court is  
6 not required to accept plaintiff's allegations as true."  
7 That's their words, and so now what they've done to try to -- I  
8 know what happened.

9 They got word, you need to get this case dismissed.  
10 We got to get rid of this thing. We have an exhibition we  
11 want. The Torlonias want their money. They want to do this  
12 deal. We can't do this deal with this lawsuit pending. We've  
13 got to get this thing dismissed. So now they've moved to  
14 dismiss the contract claim.

15 They said they were not going to move to dismiss.  
16 They may want to move it on summary judgement. That's fine.  
17 But summary judgement should come after adequate discovery,  
18 fair discovery. This is three years' worth of millions of  
19 dollars of time, effort and money that they have stolen.  
20 Stolen. There's no nice word for it.

21 THE COURT: Mr. Macdonald?

22 MR. MACDONALD: Yeah, your Honor. I'm looking at  
23 plaintiff's June 14th letter.

24 THE COURT: Yes.

25 MR. MACDONALD: And that confirms for me that the



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1 quote, what they are quoting is a statement at the beginning of  
2 our initial motion to dismiss, which means the obvious, which  
3 was that we were not dismissing that pleading because, in our  
4 view, we couldn't win a motion to dismiss a contract claim on  
5 the 12(b)(6) motion. They changed the pleadings. They've  
6 changed the allegations, and we've concluded now that, on the  
7 amended pleading, they have not plausibly alleged they have any  
8 contract here.

9 THE COURT: So that quote predates the Court's ruling  
10 on the initial motion to dismiss?

11 MR. MACDONALD: Yes, your Honor. It was on the very  
12 first page, or maybe the second page, of our initial motion to  
13 dismiss that we filed 2017 sometime. It was never discussed in  
14 connection with the stay at all.

15 MR. SHORE: Now we've gone in the rabbit hole.  
16 They're saying that they realized they couldn't get the  
17 original contract claim dismissed? The new contract claim has  
18 the same allegations in more detail. So, and I invite you to  
19 compare the two. That is -- we are deep in the rabbit hole at  
20 this point. There is no way that they can say that the  
21 contract claims changed.

22 We have always said that a transaction includes more  
23 than a contract. That, and, obviously, the word transaction  
24 obviously means an exhibition, a gift, whatever you want to  
25 call it is a transaction. A donation is a transaction. So,

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1 again, this -- and I know I'm repeating myself, and I  
2 apologize.

3 I'm a little bit perplexed at this entire process  
4 right now. Just let us turn on the light. Let me take some  
5 depositions, and let me get to the truth. Let me show you what  
6 they really looked for and what they didn't look for. Let me  
7 show you how they have massively narrowed the request to mean  
8 something that doesn't reveal anything. This is obstruction at  
9 its height.

10 Now, they're smart. These are brilliant lawyers, and  
11 they're very smart, but I'm pretty smart, too, and I know  
12 what's going on. And what I would like to do is be able to  
13 enlighten you, after taking some depositions, to show you  
14 exactly what they have done and exactly what they plan to do.  
15 And again --

16 THE COURT: Let me ask you this, Mr. Shore, because  
17 part of what I'm trying to do is I'm trying to put this time  
18 line together as to -- because you're making a lot of  
19 allegations and you're making a lot of accusations about  
20 wrongdoing not only on the part of The Getty Museums and  
21 others, but on the part of counsel.

22 And I'll ask you straight out. If, in fact, that  
23 quote that you put in your letter predates the Court's opinion  
24 in the initial motion to dismiss and, in fact, the  
25 communications between counsel leading to the agreement to stay

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1 depositions is as Mr. Macdonald represented, and I'll give you  
2 an opportunity to respond to that, which is to say that he made  
3 no assertions that they would not move to dismiss the contract  
4 claims, then why isn't this quote out of context in an effort  
5 to mislead the Court?

6 MR. SHORE: It's not out of context. The context is  
7 this was part of the discussion which was later brought forward  
8 in their motion, but the discussion was: What are we going to  
9 do about discovery? When are we going to start taking  
10 depositions? And we wanted to take depositions after an answer  
11 was filed because we want to know what facts are at issue. We  
12 still don't know.

13 They don't deny anything. So we don't have an answer  
14 about what's denied and what's not denied. So we agreed, let's  
15 file your original rule 12 motion an they said we're not going  
16 to file on the contract claims because he just said, we can't  
17 win, we couldn't win a 12(b)(6) in the contract claims.

18 So the way this was set up was we would wait and do  
19 depositions until after there was an answer filed, which was  
20 after you ruled on their first motion to dismiss. The first  
21 motion to dismiss. And they would have to file an answer.  
22 Then we'd know what facts were in dispute, and then we would  
23 take depositions.

24 And they did not originally move, and they told us  
25 they were not going to originally move, on the contract claims.

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1 So that's the context. You're not going to move on the  
2 contract claims. We want to wait and take depositions until  
3 after an answer is filed so we know what facts are in dispute,  
4 and also, since they're not moving on the contract claims,  
5 whether or not the Court dismisses some of these other claims,  
6 then we'll also know whether or not we need to take depositions  
7 on those or not.

8 THE COURT: And that was the state of play when?

9 MR. SHORE: Before they filed their first motion to  
10 dismiss. I'm sorry.

11 MR. HOWARD: And I'm sorry. To interject for a  
12 moment, I was involved in these negotiations. Because the  
13 ruling on the first motion to dismiss came out close to the end  
14 of the discovery period, I reached out to Mr. Macdonald. He  
15 represented twice on the record to the Court that they weren't  
16 going to move on contract under rule 12(b)(6).

17 THE COURT: When?

18 MR. HOWARD: This was after the ruling on the first  
19 motion to dismiss. Okay. So admittedly, in his first motion  
20 to dismiss, he said we're not moving on contract because we  
21 have to accept plaintiff's allegations as true. With that  
22 representation on the record, I felt assured that we were going  
23 to get an answer at some point in time.

24 It befuddles me to this day that we have walked back a  
25 representation to the Court on the record twice. So at that

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1 point, with our understanding that the case would be going  
2 forward at least as to some claims, it made sense to do  
3 depositions once, as opposed to once pre-answer and once  
4 post-answer.

5 And your Honor asked earlier: What has changed?  
6 Well, what has changed is that they filed a motion to dismiss  
7 that is really a poorly cloaked motion for summary judgement  
8 that throughout repeatedly relies on attorney argument that  
9 extensive discovery has been taken. And that's one of the  
10 reasons we're here today is because what they're really doing  
11 is making a motion for summary judgement under 12(b)(6) and  
12 trying to prohibit us from getting discovery while, at the same  
13 time, claiming we've gotten enough.

14 THE COURT: Claiming?

15 MR. HOWARD: We've gotten enough. Well, extensive  
16 discovery.

17 MR. SHORE: And to back up to the other point, that's  
18 the correct timeline. The other point is every answer to  
19 discovery that they give is their interpretation of the  
20 question in a way that is as narrow as possible. It's  
21 everything they do is to hide and obstruct, and that's why I  
22 need the deposition, and that's why I need the depositions of  
23 Mr. Clark --

24 THE COURT: Let me ask. Did I have a pre-motion  
25 conference with respect to the filing of the second motion to

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1 dismiss?

2 MR. HOWARD: Yes, your Honor.

3 THE COURT: Was all this discussed?

4 MR. HOWARD: Some of it was, yes. We mentioned the  
5 fact that we were surprised they were moving on contract, given  
6 they previously represented they were not, but the issues of  
7 whether or not depositions would go forward was not ripe at  
8 that time.

9 MR. MACDONALD: May I be heard for a moment, your  
10 Honor?

11 THE COURT: Yes, please.

12 MR. MACDONALD: Your Honor, this precise argument was  
13 used as a basis to oppose our request to file a motion for  
14 summary judgment -- or, excuse me, under 12(b)(6), that we had  
15 previously represented we would not, but the Court granted us  
16 leave. And the motion that we filed with the Court was the  
17 same motion that was described in our pre-conference letter.

18 THE COURT: Okay. I'm not going to lift the stay on  
19 depositions.

20 Next. What about the --

21 MR. HOWARD: So we have some issues with respect to  
22 documents and privilege, and we have two letters and as a  
23 matter of moving things along quickly, I can kind of sum the  
24 issues into discovery issues and privilege issues.

25 THE COURT: Very well.

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1 MR. HOWARD: Some of the discovery document issues has  
2 already been touched upon. One of those is the fact that we  
3 had 25,000 search terms that resulted in 300 documents.  
4 Another is the fact that we issued our second request for  
5 production. They refused to answer, or produce any documents  
6 in response to 35 out of 41 of those RFPs, and produced only 15  
7 documents.

8 And one of the reasons we've been asking for these  
9 depositions is to understand truly what's being done to  
10 identify custodians, sources of information, and have that  
11 information produced. And Mr. Shore represented or mentioned  
12 previously, we just learned, through the acquisition policy  
13 they noticed in one of their responsive letters, that they  
14 claim all, "ongoing activities, such as exhibitions, loans,  
15 research and correspondence with donors, artists and scholars  
16 should be recorded in the museum's collection management  
17 database, TMS. Any original paper file should also be  
18 retained. Each curatorial department maintains organized  
19 records on exhibitions, loans and works of arts for possible  
20 purchase or gift."

21 All that Mr. Macdonald has ever talked about are  
22 producing documents from individual custodians, not from any of  
23 these sources. And what we see through these letters is that  
24 we're not withholding information. Well, that's true because  
25 they're not getting the information. They're intentionally not

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1 looking at the particular source of information.

2 And we tried to get around this by proposing  
3 additional search terms, and they said no, no more search  
4 terms. You don't get anything unless we agree that there are  
5 some total limit on the search terms. Well, that's contrary to  
6 what they did to me. They recently -- we conferred back and  
7 forth, and when I told them I'd produced everything, I said,  
8 but in you want, you can issue more search terms. They sent me  
9 80 new search terms just last month, on the 21st. You know,  
10 we'll agree and search. Discovery is an iterative process, and  
11 we'd like them to participate in that as well, as opposed to  
12 trying to dispose of the case on this incomplete record.

13 THE COURT: So let's try to separate these issues  
14 because, on the one hand, there's the issue of, as I understand  
15 it, they have made a search using terms that were agreed upon.  
16 There were certain number of hits, and they say that they  
17 turned over the hits that were relevant to this case and have  
18 not turned over hits that were not relevant to this case.

19 MR. HOWARD: What they said is they turned over hits  
20 that say Torlonia. I don't know that that's relevant to this  
21 case, and that's one of the problems with using search terms  
22 and why we're trying to get at the actual source of --

23 THE COURT: Isn't that how discovery is handled every  
24 day in every case?

25 MR. HOWARD: Search terms are one methodology of



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1 obtaining documents, but when there are discrete categories of  
2 information or discrete sources of information, like databases  
3 that are presumably organized by the artworks at issue, or if  
4 there are discrete categories of information, like  
5 communications with the Ministry that we request here, or even  
6 internal communications relating to the Italian government,  
7 which we've also requested in those letters, those can be  
8 identified separately.

9 THE COURT: When did you learn about this collection  
10 management database?

11 MR. HOWARD: I learned of it when they cited their  
12 most recent acquisition policy in response -- in their second  
13 responsive letter.

14 THE COURT: And what was the agreement as to what  
15 would be searched? Because I assume that there was an  
16 agreement about what custodians, et cetera.

17 MR. HOWARD: There wasn't. We came to your court in  
18 January of this year and talked about it, and your Honor denied  
19 a number of my search terms, that I can't recall off the top of  
20 my head, as well as a number of different custodians, including  
21 each of The Getty trustees, whom we learned all visited the  
22 Torlonia collection and the Torlonia family in Italy. So there  
23 wasn't an agreed set of search terms. It was an order that set  
24 the custodians and search terms.

25 THE COURT: Okay. And you learned about this database

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1 when?

2 MR. HOWARD: Just reading -- they said, hey, look, our  
3 acquisition policy is available online, cited me a web page. I  
4 looked it up on my way here.

5 MR. SHORE: Here's the disconnect again. 30 people  
6 went to Italy, 30 members of their trustees and we don't even  
7 have the e-mails between them and among those 30 people who  
8 went on the trip about what happened on the trip, who they  
9 talked to, what they thought, what they did, and I mean that,  
10 nothing.

11 I mean, we've given everything. We are an open book.  
12 I'm willing to waive attorney-client privilege, if they'll do  
13 it. I just want the light on. I don't understand why, and I'm  
14 really -- and I'm struggling. I practice all over the country,  
15 probably 30 federal districts. I've never seen anything like  
16 this with these guys.

17 THE COURT: Let me ask Mr. Macdonald. Mr. Macdonald,  
18 what about this collection management database?

19 MR. MACDONALD: Your Honor, we're happy to search it.  
20 It's never been mentioned to me before until now that I should  
21 search the collection management database. I'll be candid.  
22 The reason I didn't search the collection management database  
23 is that based on the investigation that I did, I didn't think  
24 there would be any responsive documents. But we're happy to  
25 search the collection management database.

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1 MR. HOWARD: We don't know what sources of information  
2 there are. We've been told they would get information from  
3 custodians. It took our independent research to identify this  
4 separate source. I don't mean to revisit the issue of  
5 depositions, but at some point in time, I would like to issue a  
6 30(b)(6) deposition that seeks the person with the most  
7 knowledge of how records are kept at The Getty so I can really  
8 get to the bottom of what sources are kept, how they're kept,  
9 what type of databases they have, what kind of internal  
10 slack-like messaging services they use to communicate with each  
11 other because that's the way to get past pure attorney argument  
12 on the issue of burdensomeness or responsiveness.

13 THE COURT: Mr. Macdonald?

14 MR. MACDONALD: Sure. Let me -- I think, let me start  
15 this discussion with a completely different approach that I  
16 previewed before, which is that what sounds like what is on  
17 offer from plaintiffs is a lot of very burdensome and very  
18 expensive discovery and a lot of decisions for the Court to  
19 make about privilege. There may be extensive investigation of  
20 every kind of communication system, 30(b)(6) depositions.

21 There's, apparently, a lack of trust in the work that  
22 I do when I investigate and do document discovery. I would  
23 submit, your Honor, that this is a case that calls out for a  
24 stay of discovery while our motion is pending, all discovery,  
25 not just deposition discovery.

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1           There's well-established case law in this circuit that  
2 a plaintiff is not entitled to discovery while they file a  
3 valid motion to dismiss -- excuse me, while they file a valid  
4 pleading. So there's no unfairness in saying to the plaintiffs  
5 that they've gotten a lot of discovery and they're not entitled  
6 to more. I think they've gotten an unusual amount of discovery  
7 before they file a valid pleading.

8           This clearly meets the balancing test that this  
9 circuit follows. There's a substantial argument for the motion  
10 to dismiss. I think the motion to dismiss argument is very  
11 strong and very likely to dispose of the case, since I don't  
12 think there are well-pleaded allegations that The Getty has a  
13 deal, and I think there's a reason for that.

14           And I think the burden that this discovery has already  
15 put on The Getty and the burden going forward justifies a stay.  
16 If the complaint survives a motion to dismiss, we can have this  
17 discussion in the future. So that would be my proposal going  
18 forward, and a way to sort of short circuit this discussion and  
19 put it off in case it's necessary because, in my view, your  
20 Honor, it's not going to be necessary.

21           THE COURT: Let me ask you this, Mr. Macdonald,  
22 because again, I'm trying to see this in the following way. To  
23 the extent that you've made searches and you've determined that  
24 there are no responsive documents, that's one thing. But what  
25 representations have been made to plaintiffs about the sources

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1 that have been -- the file cabinets, if you will, that have  
2 been searched?

3 MR. MACDONALD: I don't know how specific we have ever  
4 gotten in those discussions. We did what I think was a very  
5 standard and customary investigation, talked to custodians  
6 about where they kept documents, where we might find custodial  
7 documents. We've produced very substantial paper files. We  
8 have produced personal e-mails from Tim Potts' personal e-mail.  
9 We searched --

10 THE COURT: And who's Cox?

11 MR. MACDONALD: Dr. Potts. Dr. Potts is the director  
12 of the museum.

13 THE COURT: Okay.

14 MR. MACDONALD: He's the head honcho at The Getty  
15 Museum.

16 THE COURT: Okay.

17 MR. MACDONALD: We believe searched his text messages  
18 as well. We did not do that for every single custodian, but  
19 we've been very clear with them what e-mails we searched and  
20 which e-mails we haven't. And this is the first time I'm  
21 hearing specific complaints about the way we did that search.

22 I mean, this dispute about current document production  
23 began with plaintiff's second set of RFPs, which asked for  
24 Torlonia-related documents in a million different ways, and our  
25 response, your Honor, was to say we've already produced the

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1 Torlonia-related documents.

2 We've already searched for those. You know the search  
3 protocol we ran. You know the files that we searched. You  
4 know whose e-mails we searched. There was no request to go --  
5 at that time, to go out and look at a different source.

6 They want to talk about a source. I'm happy to engage  
7 in a negotiation about sources. I do think it's fair to ask,  
8 however, that we get some closure on this issue so that I'm not  
9 being subjected to serial discovery.

10 MR. SHORE: Your Honor, it makes no sense. The amount  
11 of time they have wasted on fighting discovery, if there is no  
12 deal, there never was a deal, there's not going to be a deal,  
13 the time they spent fighting discovery, this could have been  
14 all done and over. This makes no sense.

15 Now, if the Court, and I think their motion to dismiss  
16 is borderline frivolous based upon your Honor's own decisions  
17 that we cite, and your Honor's decisions that's cited about  
18 what's required to plead a contract. It's a frivolous motion.  
19 They know it. It's a hail Mary in the snow, which it's not --  
20 I'm a Dallas Cowboy/Minnesota Viking analogy.

21 But if the Court's going to overrule this motion or  
22 deny this motion in relatively short order, then this is all  
23 for nothing because then we'll start full bore discovery on  
24 every issue, and all this won't matter. But I should at least  
25 get a deposition, and I know you said no, but I should at least

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1 get a deposition on what they've done to search. Let me go in  
2 and find out --

3 THE COURT: Well, would you be satisfied with the  
4 lawyer's proffers as to what it is they've done?

5 MR. SHORE: No, I would not and here's why.

6 THE COURT: Why not?

7 MR. SHORE: Because I think what they've done is they  
8 called The Getty and said, hey, go look for this stuff, and  
9 they have the custodians do the search, and they have The Getty  
10 do the search. The Getty has already admitted they lied to us  
11 repeatedly.

12 MR. MACDONALD: That, I want to respond to that. That  
13 is not true, your Honor.

14 MR. SHORE: And so --

15 THE COURT: Mr. Shore, you keep saying they've  
16 admitted stuff, but you know, when I hear it, that doesn't  
17 sound like something they would admit to if they're still in  
18 this case.

19 MR. SHORE: Well, again, this is with the whole  
20 definition of transaction. They admitted they went behind the  
21 backs of my clients and contacted the Torlonia family. They  
22 admitted they went to Italy with 30 people and didn't tell my  
23 client about it and viewed the collection and talked to the  
24 Torlonia family. They admit they hired an Italian lawyer to  
25 consult with them on how to acquire the collection and legally

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1 get it out of Italy.

2 They did all that without telling my client, and their  
3 whole thing is, we went behind your back and we did this, and  
4 at the time that they were doing all this stuff behind their  
5 back, Mr. Potts looks my client in the eye in New York City and  
6 said, we don't have any interest in this collection. That's  
7 part of the fraud claim.

8 THE COURT: That's part of the?

9 MR. SHORE: That's part of the fraud claim.

10 THE COURT: Okay.

11 MR. SHORE: That they actively concealed their  
12 circumvention. Now, their whole thing is, well, it's okay for  
13 us to do that because we weren't talking about a purchase. We  
14 were talking about exhibition, or we're talking about a loan or  
15 we were talking about something else. But whatever these  
16 things were that they were talking about, they're a transaction  
17 under the agreement.

18 So everything that they tell you that they are denying  
19 that they did anything wrong is based upon an interpretation of  
20 the agreement that a transaction only involves a sale and  
21 nothing else. That's the disconnect.

22 So, you know, if your Honor is -- I think the 12(b)(6)  
23 should be converted to a summary judgement and held in abeyance  
24 until discovery is finished, actual, real discovery. If the  
25 Court wants to go ahead and deny it, which I think it should,



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1 please deny it soon so we can start taking depositions and  
2 getting this case prepared.

3 I don't want to come back here and bother you with  
4 this again and again. I don't want to argue with them over  
5 whether or not I get a deposition on this subject, limited or  
6 not limited. Let's get this case going, and stop the serial  
7 12(b)(6) motions.

8 THE COURT: Let me ask you this, then because these  
9 letter request leave to make a motion to compel. Do you want  
10 to make the motion?

11 MR. SHORE: Yes, but I mean, I think the response to  
12 the motion is going to be -- I think the response to our motion  
13 to compel is we going to be we shouldn't get any discovery  
14 until the 12(b)(6) motion is decided, and if that's going to be  
15 their response, if that's their response, and I think that is  
16 going to be their response, let's deny their 12(b)(6) motion  
17 and let us go do discovery and we'll see you for trial.

18 But right now, this is just going to be another --  
19 it's going to be a 12(b)(6) after 12(b)(6), delay after delay,  
20 block, obstruct, obstruct, obstruct. And yes, I mean, let me  
21 file my motions to compel. Let me take depositions. Let's  
22 have a lawsuit.

23 THE COURT: Mr. Macdonald?

24 MR. MACDONALD: I mean, I think we should not have  
25 discovery right now would be part A of my opposition to the

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1 motion to compel, but I certainly think we would respond on the  
2 merits. I think the discovery that we have -- for the searches  
3 for documents that were done in this case have been quite  
4 reasonable, and I think they're defensible, and eminently so.  
5 And I think they were done in an ordinary way.

6 I would like to say, and I don't think I actually have  
7 a response to my question to Mr. Shore about whether or not he  
8 would agree to pay our attorney fees for the case if he turns  
9 out to be wrong, and there's no deal. And I would offer  
10 depositions of some reasonable number of Getty executives to  
11 testify on the question of whether there's a deal, and if  
12 there's no deal, then move for summary judgement, case over and  
13 we get our fees. I'd make that bargain.

14 THE COURT: Who would you propose to have deposed on  
15 the question of whether or not there was a deal?

16 MR. MACDONALD: I'd like to consult with my client  
17 briefly before I answer that question. Is that acceptable,  
18 your Honor?

19 THE COURT: Sure.

20 (Pause)

21 MR. MACDONALD: I would propose, as part of my offer  
22 to Mr. Shore, in exchange for a promise of attorney fees, to  
23 put up Mr. Clark, who is The Getty's general counsel;  
24 Dr. Potts, who is the head of the museum; Dr. Cuno, who is the  
25 head of the entire Getty Trust, so the entity that sits above

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1 and manages the Museum; and Dr. Jeffrey Spier, who is the  
2 director of the antiquities department, head antiquities  
3 curator? Senior curator of antiquities. He's the head honcho  
4 of the antiquities department.

5 THE COURT: Okay. So this is what I will do,  
6 Mr. Shore. I will reverse myself to the extent that I will  
7 allow you to take a deposition of those four individuals on the  
8 limited question as to whether or not there was a deal. If you  
9 choose to take those depositions, but I'll leave that up to  
10 you. Otherwise, I will not lift the stay.

11 Other than that, I'm just going to have you folks go  
12 ahead and brief this, and I can determine it on the papers.  
13 But it would be helpful to the Court, Mr. Macdonald, to know  
14 what it was that counsel has done, the defendants have done, by  
15 way of ensuring that all relevant documents have been located.

16 So how much time do you want to make your motion,  
17 Mr. Shore?

18 MR. SHORE: 30 days?

19 THE COURT: 30 days. 30 days to respond. Two weeks  
20 to reply.

21 MR. SHORE: May I ask for one clarification on our  
22 deal depo?

23 THE COURT: You don't have to pay their attorneys'  
24 fees.

25 MR. SHORE: No, no.

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1 MR. HOWARD: That's an important clarification.

2 MR. SHORE: No, my clarification is deal, any contacts  
3 between those people and the Torlonia family about any type of  
4 transaction at all, exhibition, donation, sale, lease, payments  
5 to any other Torlonia entity that would be consideration for  
6 doing it, like support for the bank or anything like that, just  
7 any transactions of any type or kind -- transactions as defined  
8 in the agreement -- transaction of any type or kind between the  
9 Torlonia family and The Getty.

10 THE COURT: Mr. Macdonald?

11 MR. MACDONALD: Without agreeing to the definition of  
12 transaction that counsel just used, we will interpret deal very  
13 broadly. They'll be free to inquire about The Getty's  
14 relationship with the Torlonia family from -- I would request a  
15 couple of, I think, limitations in exchange for that, your  
16 Honor. And I would submit a couple of possibilities.

17 THE COURT: Okay.

18 MR. MACDONALD: One, I think we should have reasonable  
19 time limits on these depositions. These are very important  
20 people with very busy jobs. I would propose two hours, and we  
21 do them all in one day.

22 THE COURT: We'll go with half-day each.

23 MR. MACDONALD: Half-day each. Very good. Second --

24 MR. SHORE: Just --

25 MR. MACDONALD: I'd like to request leave to move for

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1 summary judgement, and I'd like to reserve all of my remedies  
2 under Rule 11 and otherwise, if the testimony turns out to be  
3 wrong.

4 THE COURT: I'm sorry, you lost me.

5 MR. MACDONALD: I'm sorry. Let me rephrase it this  
6 way. I think if I put up witnesses, it would be reasonable for  
7 me to submit a motion -- to get leave to file a motion for  
8 summary judgment on this case the minute those depositions are  
9 complete.

10 MR. SHORE: Your Honor, if he gives me seven full  
11 hours of normal time for each of these witnesses, I'll let him  
12 file a motion for summary judgement. But half a day, that just  
13 gives them the ability to play delay games and play games.

14 THE COURT: And if they do that, you can come back to  
15 me and I'll give you another half day.

16 MR. SHORE: Do you really want to have another hearing  
17 on that?

18 THE COURT: Well, I want to get this thing resolved,  
19 and it seems like we're arguing about minutia that adults  
20 should be able to figure out on their own.

21 MR. SHORE: I agree with your. I mean, just let me  
22 take the deposition just according to the -- I'm not going to  
23 waste their time.

24 THE COURT: If you were going to be deposing them on  
25 the entire case, you would have a day. This is a limited

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1 deposition. Half day, and if you need to come back, I will  
2 hear you.

3 MR. SHORE: Can we call that four hours?

4 THE COURT: Yes, four hours. That's my definition of  
5 half day.

6 MR. SHORE: Okay.

7 THE COURT: Okay.

8 MR. HOWARD: Your Honor, do you want to hear argument  
9 on the privilege issues, or are we just going to brief it all?

10 THE COURT: Brief it all.

11 MR. HOWARD: Okay.

12 MR. SHORE: And we'd be happy to have a special  
13 master, and I'll pay for it.

14 THE COURT: Then agree on a special master.

15 MR. SHORE: They'll submit all their privileged  
16 documents, we'll submit all our privileged documents and let  
17 the special master decide. I'll pay for it.

18 THE COURT: I'm happy to consider that. Put that in  
19 your motion because I don't want to look at all those  
20 documents. Okay? So we have the dates for the motion?

21 THE DEPUTY CLERK: The motion is due October 12th,  
22 2018. The opposition is due November 12th, 2018, and the reply  
23 is due November 30, 2018.

24 THE COURT: And I take it, Mr. Shore, that you are  
25 going to be taking those depositions?

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1 MR. SHORE: I will be taking those depositions.

2 THE COURT: Very well. Obviously, no one's rights  
3 are -- you have whatever rights you had when you came in here.  
4 So you can make whatever motions you want that are appropriate.  
5 Okay?

6 MR. SHORE: Thank you, your Honor.

7 MR. MACDONALD: Thank you, your Honor.

8 THE COURT: Thank you, folks.

9 (Adjourned)

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